No. 12378

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL, and Its Agent, LLOYD A. MASHBURN; MILLWRIGHT AND MACHINERY ERECTORS, LOCAL 1607, OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A.F.L., and Its Agent, HERMAN BARBAGLIA,

Appellants,

vs.

HOWARD F. LEBARON, Regional Director of the Twenty-first Region of the NATIONAL RELATIONS BOARD, for and on Behalf of the NATIONAL LABOR RELATIONS BOARD,

Appellee.

APPELLANTS' OPENING BRIEF.

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Los Angeles Building and Construction Trades Council, and Its Agent, Lloyd A. Mashburn; Millwright and Machinery Erectors, Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A.F.L., and Its Agent, Herman Barbaglia,

Appellants,

vs.

Howard F. Lebaron, Regional Director of the Twenty-first Region of the National Relations Board, for and on Behalf of the National Labor Relations Board,

Appellee.

APPELLANTS' OPENING BRIEF.

Jurisdiction of This Court and the District Court.

As alleged in the Petition below jurisdiction thereof and jurisdiction to issue the temporary injunction appealed from by appellants' notice of appeal to this Court [Tr. 123], is conferred by Section 10-l of the Labor Management Relations Act of 1947 [Tr. 4]. More basically, the right of the Board to apply for that injunction depends on whether the conduct alleged against respondents below

and appellants here affects commerce within the meaning of Section 2, Subsections (6) and (7) of the Act. The commerce allegations of the Petition are to be found in Paragraph 9, Subsections a, b, c, e, f, and g of the Petition [Tr. 5-9, incl.] and commerce affidavits filed by Wm. L. Sheets [Tr. 26] and Wm. L. Budge [Tr. 28]. Commerce is denied by Respondent's Return, Paragraph IX [Tr. 43] and by the Mashburn affidavit [Tr. 55] and one of the contentions of appellants in this appeal is that no sufficient showing on commerce was before the District Court. This Court has jurisdiction of the appeal under 28 U. S. C. A. 225.

Statement of the Case.

Appellants are a local labor organization operating in Los Angeles County, California, comprised of workingmen who follow the trade of setting and installing machinery, and affiliated with the Carpenters Brotherhood, American Federation of Labor; the Building Trades Council of that county operating under the Building Trades Department of the American Federation of Labor; and the individual executive heads of the two organizations.

Pursuant to their notice of appeal [Tr. 123] they come here for relief from a judgment of the District Court [Tr. 121], the judgment being one of injunction against appellants, and ask this Court to strike down that judgment, order it vacated, and to relieve appellants from its restraints and inhibitions.

The petition for injunction here is by an officer of the National Labor Relations Board under Section 10-1 of

the Taft-Hartley Act upon a charge of violation of Section 8(B)(4)(D), the "jurisdictional strike" section of that Act.

Whether or not petitioners showing below is sufficient under the sections mentioned, it is a showing, as to acts of appellants, lawful, if prior to, and except for, the Taft-Hartley Law.

Possibly by accident as much as by design, the Transcript here provides a remarkably clear view of the workings of the union unfair labor practice provisions, the injunction provisions, and the jurisdictional strike provisions of the Taft-Hartley Act.

As will be seen by the Board's Decision in the 10-K proceeding [Tr. 229 at Tr. 237] this case was the fourth to come before the Board after a 10-K hearing, and the Board's Decision here is their fourth 10-K Decision. It was the first case to come before the Board after hearing on a complaint issued under Section 8(B)(4)(D) charging the union unfair labor practice of jurisdictional strike, and was argued before the Board January 5, 1950. Following the Board Decision further we find approximately 650 members of unions affiliated with appellant council working for Stone and Webster, ostensibly the general contractor, and for subcontractors, on a power plant for Edison [Tr. 233, 234, 235]. Westinghouse, on a direct contract with Edison, installs turbo-generators exclusively with Machinists, an independent union, to the exclusion of Millwrights, an American Federation of Labor union [Tr. 235, 238] though having no right to give exclusive

employment privileges to the Machinists under Section 8-a-3 of the Taft-Hartley Act [Tr. 240].

The gist of the charge against appellants is that on February 2, 1949, all of the American Federation of Labor workers refused to work on the job and that on March 29, 1949, certain American Federation of Labor Ironworkers refused to work with the Machinists employed by Westinghouse, in violation of Section 8(B)(4)(D) [Tr. 9, 10]. As will be seen from the affidavit of Mashburn, Secretary-Treasurer of the American Federation of Labor Council, the Machinists have never been certified to represent any Westinghouse workers under the Act nor become entitled to any preference in hiring under Section 8-a-3 thereof [Tr. 57], and the actions alleged against the American Federation of Labor in the petition were for the purpose of breaking up the unfair labor practice existing between Westinghouse and the Machinists and getting American Federation of Labor members the employment opportunities from which they were being excluded under the practices and agreements between Westinghouse and the Machinists in violation of Sections 8-a-1, 8-a-3, 8-b-1, and 8-b-2 of the Act [Tr. 54]. The Return to the Rule to Show Cause also denies that the activities of February 2, 1949, were anything but a concerted protest, authorized by Section 7 of the Act, against the unfair labor practice on the part of Westinghouse and the Machinists above-mentioned [Tr. 45] and that the activities of the ironworkers on April 11, 1949, were anything more than a protest on their part to obtain a collective agreement with Westinghouse (as alleged in the affidavit

of the Westinghouse superintendent attached to the petition) [Tr. 47, 31], and a protest under Section 7 of the Act against the Westinghouse-Machinist unfair labor practice. Attached to the Mashburn affidavit is the secondary boycott charge against the American Federation of Labor which was dismissed or never acted upon, the charge of unfair labor practice against Westinghouse and the Machinists which was pending; the contract between Edison and Stone and Webster is also attached so that it may be seen that in all matters Stone and Webster is merely the agent of Edison, and letters are also attached to show that in the installation of the equipment, which is all that is involved in the labor dispute, Westinghouse also is an agent of Edison. The work belongs to the American Federation of Labor under the American Federation of Labor-Stone and Webster contract, behind which Edison is operating [Tr. 236].

The long affidavit beginning at Tr. 124 serves the purpose of bringing in admissions of representatives of Westinghouse and the Machinists as to the unfair labor practice being maintained by them and the letters at Tr. 222, 223, 224, 225, 226 and 227 are for the same purpose.

It will be noted that while the Board's decision after the 10-K hearing is dated May 11, 1949, and allows ten days for compliance, a petition for injunction was filed May 3, 1949 [Tr. 13, 83] and heard May 16, 1949 [Tr. 38].

As is usual in matters involving the construction trades, wherein work is completed in limited periods, instead of

going on indefinitely as in factories, the so-called temporary injunction obtained by unusual haste of the Board's General Counsel in protection for the Westinghouse Company against union activity will be as useful to the fortunate employer as a determination on the merits by the Board.

While the unions contend that the other subsections of Section 8 are for the purpose of permitting non-unionists to enjoy the benefits of union membership, compelling unionists to break each others strikes and tear down each others wages and working conditions, and to encourage the production of non-union products by forcing unionists to add labor to them, the charge against subsection B-4-D is that it ousts the Board of jurisdiction to determine representation and invests the employer with that power. It will be noted that the dispute here is not an overlapping of jurisdiction on the edges but a claim by each of two unions for the whole of the work [Tr. 56, 57, 213].

It is the contention of the unions that this is not a jurisdictional dispute, but a dispute over representation and this is the view of the two members of the Board who dissented in the three previous 10-K cases [Tr. 237].

We invite attention to the injunction here from the aspect of its invasion by its sweeping terms of personal rights, its rubber stamping of the employment policy as fixed by the employer, and its substitution of an administrative officer's views for proof as a basis of jurisdiction.

Points on Appeal; Specifications of Error.

I.

If it was intended by Congress that Section 8(B)(4)(D) Title I of the Labor Management Act of 1947 should prohibit a union and its members to strike to win from an enemy union or from non-union employees contested work opportunities or to refuse to perform services for the employer in that situation, said section of said Act is in that respect unconstitutional and void because in violation of the First, Fifth and Thirteenth Amendments of the Constitution of the United States.

II.

The injunction appealed from was issued upon evidence insufficient to warrant the issuance thereof.

III.

Petitioner below showed no probable, sufficient or any cause or finding thereof to apply for the injunction appealed from.

IV.

The trial court erred in issuing the injunction on proof that petitioner had reasonable cause to believe that the charge was true and a complaint should issue, such showing being sufficient on charges of violation of Sections 8(B)(4)(A), 8(B)(4)(B) and 8(B)(4)(C) of the National Labor Relations Act as amended, hereinafter called the Act, but not on charges of violation of Section 8(B)(4)(D).

V.

The trial court had no jurisdiction to entertain a petition for injunction within the time allowed for voluntary compliance with the decision of the Board under Section 10-K of the Act.

VI.

The injunction appealed from was issued to restrain a strike by appellants against the Machinists and Westinghouse for violation of Sections 8-a-1, 8-a-3, 8-b-1 and 8-b-2 of the Act constituting Unfair Labor Practices under the Act, which excluded members of appellants from employment; on the evidence the work stoppage is a result of the illegal closed shop contract; an unfair labor practice strike is protected union activity.

VII.

The injunction appealed from is couched in the language of the Act, is so vague and indefinite that it is impossible to ascertain therefrom what conduct is allowed and what conduct is forbidden, and is contrary to Rule 65(d).

VIII.

The injunction appealed from is broader than the dispute involved and decided by the Board, unnecessarily restricts the rights of the union members, compels them to work against their desires and prohibits their withholding their services.

IX.

The Act does not confer jurisdiction on the Board to hear and determine matters such as are presented in this case arising out of a building enterprise purely local in nature and not contributing to the flow of interstate commerce, and hence the District Court had no jurisdiction to entertain the petition.

X.

The Sixth Finding of Fact based on the Second Amended Charge erroneously supports the injunction with matters not considered by the Board or on which there has been a 10-K hearing.

XI.

The acts and conduct of the Respondents below justifying the issuance of the injunction are not found or specified in reasonable detail.

XII.

The injunction is not limited to proper *pendente lite* relief but finally determines the issues presented by the charges against the unions and grants full and final relief against them without trial.

XIII.

The injunction erroneously omits to preserve to the unions the rights guaranteed by Section 8-C of the Act in failing to exclude from its prohibitions acts which do not involve threats or reprisal or promises of benefit.

I.

If It Was Intended by Congress That Section 8(B)(4)(D), Title I of the Labor Management Act of 1947 Should Prohibit a Union and Its Members to Strike to Win From an Enemy Union or From Non-Union Employees Contested Work Opportunities or to Refuse to Perform Services for the Employer in That Situation, Said Section of Said Act Is in That Respect Unconstitutional and Void Because in Violation of the First, Fifth and Thirteenth Amendments of the Constitution of the United States.

Labor unions have the right to exist and to function. That right is guaranteed by the First Amendment to the Constitution of the United States. The right is also pronounced as a policy of the United States in Title I, Section 1 of the Taft-Hartley Act. The right of workers to organize into labor unions is the right peaceably to assemble and to redress grievances.

> "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights . . . and therefore are united in the First Article's assurance."
>
> *Thomas v. Collins,* 323 U. S. 516, 530.

No labor union could function or continue in being if it did not have the right to discipline and control its membership for violation of lawful union principles.

Those who would deny the right to strike and peaceably picket have always argued that peaceful picketing and strikes may be banned because its purpose is to persuade

persons not to perform services nor to purchase merchandise and that the resultant detriment to the business involved should take precedence over the workers' interests. It was on this theory that Shasta County, California, sought to justify the ban on picketing which was invalidated by the Supreme Court in *Carlson v. California,* 310 U. S. 106, 112. There the court said:

> "It is true that the ordinance requires proof of a purpose to persuade others not to buy merchandise or perform services. Such a purpose could be found in the case of nearly every person engaged in publicizing the facts of a labor dispute; every employee or member of a union who engaged in such activity in the vicinity of a place of business could be found desirous of accomplishing such objectives; disinterested persons (who might be hired to carry signs) appear to be a possible, but unlikely, exception. In brief, the ordinance . . . proscribes the carrying of signs only if by persons directly interested who approach the vicinity of a labor dispute to convey information about the dispute."

The rule is now as Mr. Justice Brandeis said it should be in his dissent in *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association,* 274 U. S. 37, 56:

> "The Constitution of the Journeymen Stonecutters' Association provides: 'No member of this association shall cut, carve or fit any material that has been cut by men working in opposition to this association . . .' So far as concerned the association, the individual stonecutter was not free. He had agreed, when he became a member, that he would not work on stone 'cut by men working in opposition to' the association. *It (the union) was in duty bound to urge upon its members observance of the obligation as-*

sumed . . . The controversy out of which it arose, related, not to specific grievances, but to fundamental matters of union policy of general application throughout the country. The national association had the duty to determine, so far as its members were concerned, what that policy should be. It deemed the maintenance of that policy a matter of vital interest to each member of the union. The duty rested upon it to enforce its policy by all legitimate means." (Emphasis added.)

"The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment . . . *That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions.* And it is the character of the right, not of the limitation, which determines what standard governs the choice . . .

"*For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.* The rational connection between the remedy provided and the evil to be curbed which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, *must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount in-*

> *terests, give occasion for permissible limitation.* It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly." (Emphasis added.)
>
> *Thomas v. Collins, supra.*

The emphasis as indicated in the *Collins* case is upon the protection and preservations of liberties secured by the First Amendment. The liberties under the Fifth and Thirteenth Amendments are equally secured. These liberties do not permit dubious intrusion. Only the gravest abuses endangering paramount interests give occasion for permissible limitation. It is submitted that none of these qualifications exist here. Rather there is no public danger, actual or impending. The case comes down merely to the employment of an individual and in seeking to invoke the employment of one individual the case would cause 700 employees to violate their union obligations and forego the right which the *Bedford Cut Stone* and *Thomas v. Collins* cases clearly indicate are constitutionally protected. It should be unnecessary to point out that Congress possesses no power to set aside the constitutional guaranties.

The withdrawal of the members of the Los Angeles Building and Construction Trades Council and of the picketing that did exist was admittedly peaceful. The purposes sought to be attained by this activity are those which long ago prompted Chief Justice Taft in *American Steel Foundries v. Tri-City Central Trades Council,* 42 S. Ct. 72, at page 78, to say:

> "It is helpful to have as many as may be in the same trade, in the same community, united, because in the competition between employers they are bound to be affected by the standard of wages of their trade

in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild."

Neither by Congressional Act nor by decree of the highest court can the fundamental rights of the First Amendment be abridged or denied where those rights are peaceably exercised and in the pursuit of a lawful objection. The scope of the First, Fifth and Thirteenth Amendments is not confined by the notion of Congress regarding the limits to be imposed in an industrial dispute. *American Federation of Labor v. Swing,* 61 S. Ct. 568, and the interdependence of economic interests of all engaged in the same industry has become a commonplace.

American Steel Foundries v. Tri-City Central Trades Council, supra.

These rights, therefore, cannot be mutilated by denying them to the worker in a dispute with an employer *even though they are not in his employ.* Communication by such employees of the facts of a dispute deemed by them to be relevant to their interests "can no more be barred because of concern for the economic interest against which they are (acting) . . ."

Senn v. Tile Layers Union, 301 U. S. 468;

American Federation of Labor v. Swing, supra.

The court in *Thornhill v. Alabama,* 310 U. S. 88, cogently reinforces this position. In declaring an anti-picketing statute of the State of Alabama unconstitutional, the Supreme Court said:

"In the circumstances of our times the dissemination of information concerning the facts of a labor

> dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing."

Not only are the constitutional expressions of the Supreme Court adverse to the legislation here considered, but the Supreme Courts of several states have taken a similar view. The Supreme Court of California in *In re Blaney,* 184 P. 2d 892, 30 Cal. 2d 643, struck down the California Act similar in terms to Section 8(B)(4), holding it unconstitutional because of its conflict with United States constitutional provisions. In that case Blaney had been found guilty of contempt for causing or threatening to cause employees to cease performing services. The California court, in reaching its decision, quoted approvingly from an earlier decision of that court (*Steiner v. Long Beach Local,* 19 Cal. 2d 676) as follows:

> "It is now settled law that workmen may lawfully combine to exert various forms of economic pressure upon an employer provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions and they act peaceably and honestly."

The California Court supported its conclusions with *American Federation of Labor v. Swing, supra,* and *Bakery Drivers Local v. Wohl,* 62 S. Ct. 816.

Section 8(B)(4)(D) is unconstitutional for the further reason that it compels involuntary servitude or services by employees against their will.

> "The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community."
>
> *Stapleton v. Mitchell,* 60 Fed. Supp. 51, at 61.

In this case the constitutionality of the 1943 Kansas labor law was under attack as being in contravention of the First and Thirteenth Amendments. A portion of that statute made it unlawful for any person to refuse to handle, install, use or work upon particular materials or equipment, *or to cause any cessation of work or interfere with the progress of work by reason of any jurisdictional dispute, grievance, or disagreement between or within labor organizations.* A three-judge Federal Court, composed of two Circuit Court judges and one District judge, held this portion of the statute to be unconstitutional and void on its face, and entered an injunction against the State of Kansas from enforcing or giving effect thereto. And even though one of the judges dissented he agreed with the majority in this respect.

In the course of this opinion the court pointed out:

> "That the existence and operation of a labor union necessarily involves the integrated, correlated and concerted activities of everyone connected with the organization, from the individual member to the highest official; that the activities of the individual member

as he goes about his daily work preaching the doctrine of unionism is the heart and soul of the organization and without which it cannot exist. It is also established that the life and strength of a labor organization is dependent upon the free exercise of speech, press and assembly, by all those who further its objects, regardless of their status in relation to the organization. It is plain also that compliance with certain provisions of the Act is a condition precedent to the exercise of whatever rights are involved in the functioning of a labor organization, and it is of course fundamental and self-evident that free speech, press and assembly are sacred human liberties, and their free exercise cannot be made to depend upon any condition imposed by state law, nor may they be previously restrained in the absence of clear and present danger to the community."

The court then went on to review the *Senn, Thornhill, Meadowmoor, Swing, Wohl* and *Ritter* cases, and concluded that:

"Since picketing is only one of the familiar weapons used by unions in attainment of their economic objectives, we think the philosophy of the cases which have defined the quality of free speech inherent in picketing *furnishes a reliable criterion for the determination of the quality of the rights involved in the whole of the economic struggle in the field of industrial relations.*"

The rationale of the *Stapleton* case and the cases therein cited is that the refusal to handle or install, use or work upon particular material or to cause any cessation of work or interfere with the progress of work by reason of any jurisdictional dispute, grievance or disagreement between or within labor organizations are rights protected by the

constitutional guaranty, and it was on this premise that the court struck down the portions of the statute which were designed to outlaw jurisdictional disputes, holding that such legislation contravened the constitutional protections provided by the First and Thirteenth Amendments.

What the Kansas statute sought to attain is identical with the prohibitions found in Section 8(B)(4)(D) of the Taft-Hartley Act. That section seeks to outlaw so-called jurisdictional disputes. It prohibits a strike or concerted refusal to work when there is a dispute over what employees in a union, "trade, craft, or class" are to do certain specified work. Such prohibitions cannot prevail against the constitutional guaranty so forcefully described and reasoned in the *Stapleton* case, *supra*. It is evident that the danger of injury to the industrial concern here involved is neither so serious nor so imminent as to justify the sweeping proscription of freedom embodied in Section 8(B)(4)(D). (See *Thornhill v. Alabama, supra.*)

Section 8(B)(4)(D) is invalid for a still further reason in that it sets up and imposes a system of compulsory arbitration which deprives the Los Angeles Building and Construction Trades Council, its affiliates and members, of property and liberty of contract without due process of law.

In *Wolff Packing Co. v. Court of Industrial Relations,* 262 U. S. 522, there was involved the validity of the Court of Industrial Relations Act of the State of Kansas. That Act vested in an industrial court power upon its own initiative or upon complaint to summon the parties and hear

any dispute over wages or other terms of employment in any industry, and after such hearing to fix wages or terms and conditions of employment in the particular industry involved. The Supreme Court, speaking through Chief Justice Taft, invalidated this portion of the Kansas statute for the reason that it curtailed the rights of the employer and the employee to contract about their affairs. The court said:

> "This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment (citing cases). . . . Freedom is the general rule, and restraint is the exception. The legislative authority to abridge can be justified only by exceptional circumstances."

The Chief Justice pointed out in the course of the opinion that the parties were bound by the findings of the industrial court and the worker, while not required to work, was forbidden under the penalty of fine or imprisonment to strike against the finding of the industrial court, and "thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows give him." The Chief Justice concluded by holding that the provisions of the Act which gave the industrial court the power to summon the parties and to fix their working conditions deprived the parties of the liberty of contract, which deprivation was constitutionally invalid.

In a subsequent case, *Dorchy v. State of Kansas,* 264 U. S. 286, the United States Supreme Court, speaking

through Mr. Justice Brandeis, restated its conclusions reached in the *Wolff Packing Company* case, and again held that a system of compulsory arbitration violates the Federal Constitution.

In the instant matter there is no doubt that a 10(k) proceeding, bottomed though it is on Section 8(B)(4)(D), is a system of compulsory arbitration. As originally written, Section 10(k) provided for the appointment of an arbitrator to resolve jurisdictional disputes, but the word arbitrator was stricken in conference and the Board was substituted in its place. (See Conference Report.) That it is a matter of arbitration is frankly conceded by members Murdock and Houston in their dissenting opinion in *Juneau Spruce Corporation,* 82 N. L. R. B. No. 71, decided April 1, 1949. It is not arguable that the mere substitution of the Board for the arbitrator destroyed the effect of compulsory arbitration which the Congress wrote into the Act, for as indicated in the *Wolff Packing Co.* and *Dorchy* cases, the exercise of the compulsory arbitration power there was to be performed by a court of industrial relations composed of three judges.

In effect the Supreme Court held that it is of no matter what the tribunal is called, it is the deprivation of the right to freely contract that the court holds sacred and has stated may not be destroyed by legislative enactment.

Nor is it an answer to say that Section 10(k) is not compulsory arbitration because it allows an appeal by indirect means to test the validity of the determination thereunder. The Kansas Act also allowed an appeal in

the Supreme Court of the State of Kansas, but notwithstanding this protective device the Supreme Court of the United States in the Kansas case held that statute as a deprivation of property and liberty in contravention of the Federal guaranty.

It therefore follows that Section 10(k), since it imposes itself upon the disputants against their voluntary acquiescence, is a system of compulsory arbitration, and under the holding of the Supreme Court in the *Wolff Packing Co.* and *Dorchy* cases offends the Constitution and is null and void.

In the only other case we have found in which injunction was issued by a District Court on a charge of violation of Section 8(B)(4)(D), the case of the *Carpenters and Roofers and Goodwin and Dollger,* U. S. District Court, Northern District of California, Southern Division, August 30, 1949, C. C. H. Par. 65321, the unconstitutionality of Sections 10-K and 10-L as an improper delegation of legislative power was raised against the petition as an affirmative defense.

While we are aware of the decision of this court in *LeBaron v. Printing Specialties (Sealright),* 171 F. 2d 331, involving Sections 8(B)(4)(A) and (B), we contend that we here raise issues unconsidered by this court in that case or by the District Court in Los Angeles in this case or by the District Court in San Francisco in the *Carpenters and Roofers* case.

II.

The Injunction Appealed From Was Issued on Evidence Insufficient to Warrant the Issuance Thereof.

In treating the position of the court in 8(B)(4)(A) matters (secondary boycott) the 10th Circuit Court of Appeals clearly and forcefully pointed out that courts are not required to forego their usual equity roles where these types of cases are before them.

In *United Brotherhood of Carpenters v. Sperry,* 170 F. 2d 863, at 869, the court said:

> "It is not the inflexible duty of the court in every case of this kind to grant a temporary injunction to remain in force and effect until the Board makes its final adjudication of the charge of unfair labor practice. The court has a reasonable permissive range for the exercise of its discretion in the granting of injunctive relief appropriate to the particular circumstances presented, or in withholding its writ."

While the trial court quoted this language in its Opinion [Tr. 92], we submit that in following the spirit thereof the trial court would have been led to a denial of the injunction. The transcript contains the papers that were before the trial court and there was no oral evidence. Considering the petition and the answer, the affidavits filed for petitioner and for respondents, the preponderance of evidence is against such effect on commerce as to confer jurisdiction under Section 2, Subsections (6) and (7) of the Act. (*Industrial Association v. U. S.,* 268 U. S. 64.)

It was our position on this point, with which the trial court seemed to agree, that whether or not the trial court might substitute the judgment of the Regional Director for its own in the determination as to whether the *acts* constituting an unfair labor practice has been committed, the facts showing commerce had to show by a preponderance of the evidence in the trial court.

That the evidence in the trial court is *against* jurisdiction is due to the fact petitioner proceeded on the theory that the Regional Director's finding or reasonable cause to issue a complaint was binding on the trial court in the matter of jurisdiction. We think the Regional Director's judgment as to jurisdiction was no substitute for proof in the trial court.

Hecht v. Bowles, 321 U. S. 329, 137 F. 2d 689, 49 Fed. Supp. 528, went up to the Supreme Court on an opinion by the Circuit Court for the District of Columbia that the O. P. A. administrator was entitled to injunction as of course under the Emergency Price Control Act. In reversing, the Supreme Court had occasion to say of the theory that this emergency legislation abdicated the discretion and evidentiary basis for equity action:

> "We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied . . ."

We ask the appellate court, not for a review of a decision on the weight of the evidence, but for a reversal because the trial court has followed the federal "subpoena enforcement" cases, *I. C. C. v. Brimson,* 154 U. S. 447; *Endicott Johnson v. Perkins,* 317 U. S. 501, and apparently failed to weigh the evidence herein.

III.

Petitioner Below Showed No Probable, Sufficient or Any Cause or Finding Thereof to Apply for the Injunction Appealed From.

The charge [Tr. 14], the amended charge [Tr. 17] and the second amended charge [Tr. 21] were attached to the Petition. They were all filed with the National Labor Relations Board by a labor organization, the Machinists. They are merely in the nature of accusatory documents filed with a district attorney. The National Labor Relations Board has recently so held in *Cathey Lumber Company,* C. C. H. Par. 9280. In Paragraph 9 of the Petition it is alleged that the Regional Director has reasonable cause to believe that the second amended charge is true, that a complaint should issue on it, and that respondents have violated 8(B)(4)(D) and that such violations affect commerce under Section 2, Subsections 6 and 7. These beliefs are alleged to have been arrived at by the Regional Director as a result of investigation, the nature of which is not touched upon.

While the reasonable belief of the administrative officer is alleged to be upon the basis of the investigation, the allegation of reasonable cause is otherwise purely a conclusion.

The trial court ventures the statement: "The action of the Board, in making a determination under the provision of 10-K of the Act, is a confirmation of reasonable cause to believe that the charge is true." Such an interpretation is a perversion of the purpose of hearings under

10-K, which are not hearings on charges; in every 10-K decision including the one involved in the present case, the Board has emphasized that the only function it can perform under the Act as written is to rubber stamp the employer's choice as to which employees would do the work [Tr. 237—see footnote].

Putting the matter simply: the trial court never received or called for preponderating evidence that the acts constituting the unfair labor practice had occurred. In the face of allegations of the petition and petitioner's affidavits fully traversed by the return and by respondents' affidavits, the trial court made no effort to resolve the conflict, but held in favor of petitioner either by crediting an averment purely by way of conclusion as to the state of petitioner's mind, or by crediting as persuasive evidence the order of the Board on the 10-K hearing which was clearly incompetent except as evidence that the 10-K hearing had been held.

In Point I above we pointed out the threat of 8(B)(4)(D) to Free Speech and Assembly and its tendency to impose Involuntary Servitude, in violation of the First, Fifth and Thirteenth Amendments to the Constitution of the United States. This threat is greatly enhanced under petitioner's view of the limited discretion of the trial court in performing an ancillary function to the Board's responsibility under Section 10.

It will be seen that the decree in this case only inferentially prohibits picketing, publication, communication by letter and word of mouth and unfair listing, and directly

proceeds to invade and destroy the right to refuse to work [Tr. 122]. This in a situation where violent, untruthful, or improper picketing or picketing at all is not even alleged (*Milkwagon Drivers v. Meadowmoor Dairies*, 312 U. S. 287), and where the dispute, on petitioner's own contentions, concerns the representation of labor. (*United States v. Hutcheson,* 312 U. S. 219.)

It was of such decrees that Mr. Justice Brandeis, dissenting in *Bedford Stone Co. v. Journeymen Stone Cutters,* 274 U. S. 37, said:

> ". . . If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds one of involuntary servitude."

Upon the theory of petitioner here, developed more fully in the *Sealright* case, *supra,* the District Court is a rubber stamp for the Board which is in turn, by its own admission, merely a rubber stamp for the employer who under the Taft-Hartley Law has ousted the Board of the right to determine the representation for his employees which it formerly exercised under the Wagner Act.

Our complaint is not of the use of discretion by the trial judge, but of what we conceive to be his refusal to exercise his discretion in accordance with "traditional equity criteria."

At no stage of the proceedings has anyone met our contention in Paragraph VII of the Return [Tr. 42] that the implied finding that the 8(B)(4)(A) charge against us is unsupported is inconsistent with a finding that the 8(B)(4)(D) charge is supported.

IV.

The Trial Court Erred in Issuing the Injunction on Proof That Petitioner Had Reasonable Cause to Believe That the Charge Was True and a Complaint Should Issue, Such Showing Being Sufficient on Charges of Violations of Sections 8(B)(4)(A), 8(B)(4)(B), and 8(B)(4)(C) of the National Labor Relations Act as Amended, Hereinafter Called the Act, but Not on Charges of Violation of Section 8(B)(4)(D).

The trial judge was manifestly following the theory that his granting or withholding of the decree sought by petitioner depended on a finding that "petitioner had good cause to believe" rather than the application of "traditional equity criteria" and so considered this point in his opinion at some length, even to setting forth the whole of Section 10-l [Tr. 92, 93].

While we know of no judicial interpretation of the last sentence of that section, we hold it to be self-evident that by the use of the words "In situations where such relief is appropriate" the last sentence, relating to charges with respect to 8(B)(4)(D), contemplated something different from the finding by the regional officer mentioned before. If only that finding had been contemplated it would have been easy to enumerate 8(B)(4)(D) along with the other three sections. It seems obvious to us that "in situations where such relief is appropriate" means that injunction will issue on a showing by a preponderance of the evidence, that the violative acts have occurred and will continue unless enjoined, that they affect commerce within the meaning of Section 2, Subsections 6 and 7, and that there is no adequate remedy at law and that great and irreparable injury is threatened.

V.

The Trial Court Had No Jurisdiction to Entertain a Petition for Injunction Within the Time Allowed for Voluntary Compliance With the Decision of the Board Under 10-K of the Act.

As will be seen, 10-K contemplates voluntary settlement between the contending parties to a jurisdictional dispute and interposes the 10-K Decision and Determination between the charge and the complaint under 8(B)(4)(D).

The Petition herein was filed May 3, 1949 [Tr. 13], the 10-K decision of the Board is marked "Signed at Washington, D. C., this 11th day of May, 1949" [Tr. 241] and "Admitted May 16, 1949" and Finding of Fact No. 8, which is responsive to no allegation, recites that the decision was served on respondents therein (appellants here) on May 13, 1949. The decision gives 10 days for voluntary compliance, but under the Rule to Show Cause the Petition was before the trial court on May 16, 1949 [Tr. 38, 39].

Ordinarily we would not feel able to argue that the decision mooted the petition and that its ten day provision made the petition and hearing thereunder premature, as a showing that the point was raised in the trial court would be dehors the record, which contains only the documents, there being no oral evidence. However, the appellee has added the opinion of the trial court to this record and its recitals show the point was raised there [Tr. 95, 96].

While it is true that the court waited until May 26, 1949, shortly after the ten days to indicate its decision, we argue it was error for the court to entertain the petition after the decision and within the ten-day period provided by the decision.

VI.

The Injunction Appealed From Was Issued to Restrain a Strike by Appellants Against the Machinists and Westinghouse for Violation of Sections 8-a-1, 8-a-3, 8-b-1, and 8-b-2 of the Act Constituting Unfair Labor Practices Under the Act, Which Excluded Members of Appellants From Employment; on the Evidence the Work Stoppage Is the Result of the Illegal Closed Shop Contract; an Unfair Labor Practice Strike Is Protected Union Activity.

Section 8(B)(4)(D) reaches into the mind of the union member and commands him what not to think. When injunctions issue thereunder he thinks at his peril and may be sent to jail for what someone thinks he thinks.

A union member in walking the picket line, talking to his friends, or at work on his job must be careful to think proper thoughts, particularly if the injunction is under 8(B)(4)(D).

That the danger to the exercise of the rights intended to be secured to the individual by constitutional guarantees is much greater under 8(B)(4)(D) than under 8(B)(4)(A) may be seen by comparison of the injunction in this case under 8(B)(4)(D), the jurisdictional strike section, with that in the *Sealright* case, *supra,* under 8(B)(4)(A), the Secondary Boycott Section.

That injunction arose out of a situation in which the employees of Sealright, in pursuance of their dispute with their employer, followed his products to places where his customers and others were handling the products, and picketed the product at those places. The highly artificial contention that such conduct "constitutes the conscription

of neutrals" (*Carpenters Union v. Ritter's Cafe,* 315 U. S. at 728), is disposed of directly in the realistic reasoning of the California case of *In re Fortenbury,* 16 Cal. 2d 311.

This logical and theretofore lawful conduct having been proscribed in 1947 by 8(B)(4)(A), the court in the *Sealright* case issued the following injunction, following the language of the Act, forbidding the unionists from:

> "Engaging in, or inducing or encouraging, the employees of any employer, by picketing, orders, force, threats, or promises of benefit, ~~or by permitting any such to remain in effect,~~ or by any other like or related acts or conduct to engage in, a strike or a concerted refusal . . . where an object thereof is forcing any employer or other person to cease . . ."

The injunction in this case, in which there was withdrawal from work but no picketing, in the language of 8(B)(4)(D) essentially forbids the unionists:

> "Engaging in, inducing or encouraging, the employees of A, B, C, or any other employers, to engage in a strike or concerted refusal . . . to use, manufacture, process, transport, or otherwise handle or work on any goods . . . of A, B, C, or any other employer, where an object thereof is to force or require A, B, or C to assign the work . . ."

Now it will be seen that under the Sealright injunction the striking Sealright employee has a much better chance of keeping out of jail than has the striking employee affected by the injunction here.

In the *Sealright* case the proscribed acts are enumerated, vaguely, but still there is some suggestion of guidance: "by picketing, orders, force, threats, promises, or by any other like or related acts or conduct." Thus the

Sealright employee has some guide as to what constitutes contempt, particularly if he is able to understand what is meant by the reference to "like or related acts or conduct." He is further entitled to the comforting thought, probably erroneous, that he is less apt to be in contempt at the plant of his employer than if at the plant of a customer, supplier, or carrier of his employer.

Our exemplar employee affected by the present injunction has no guide whatever for his conduct. Anything he may do, say, write or think which has the effect of encouraging *anybody* who works for *anybody* who has relations with his employer to strike or do anything less than produce 100% in teamwork—is *contempt*. And, of course, it is contempt for our exemplar employee to himself strike, remain on strike, or stop producing 100% in teamwork.

Notice the way the provisions of 8-C are written into the Sealright injunction. Instead of being written in to qualify the rest of the injunction, they are added as additional liabilities. In the present injunction the court declined even to mention the 8-C provisions, although we strongly stressed, and repeated in our objections to the decree [Tr. 111 and 112] that we were entitled to have an injunction in which peaceful labor activities in a dispute concerning wages, hours, and conditions of labor, were protected unless containing threats of reprisal, or force, or promises of benefit. In this action the court probably followed the *United Brotherhood of Carpenters v. Sperry* case, 170 F. 2d at 869, and the discussion of this court in the *Sealright* case, *supra*.

The one qualification in the injunction here is that the acts must have for *a* purpose the inducing of the jurisdictional objective. This is the subjective element which is

the essential element of the jurisdictional strike section of this act as well as the Secondary Boycott section of this Act and the so-called Hot Cargo Act struck down by the Supreme Court of the State of California in *In re Blaney,* 30 Cal. 2d 643. It is characteristic of all of them that the prohibitions of each "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." (*In re Blaney, supra.*)

Since the subjective state of the unions at whom the petition was directed is pivotal, they took great care to show the trial court that their motive was not violation of the provisions of 8(B)(4)(D) but the breaking up of the monopolistic operation of an illegal closed shop contract between the charging union, the Machinists, and Westinghouse, which ousted their members of employment opportunities. This showing was made not only in the Return, Paragraph IX [Tr. 44 *et seq.*], but by voluminous evidence brought in by affidavit and starting at Transcript page 124. To our mind the evidence as to the purpose is overwhelming against the violation of 8(B)(4)(D) as an objective, and the presumption of lawful conduct is sufficient to guard against the assumption of a mixed objective. Since all acts of the American Federation of Labor unions are consistent with a lawful objective the presumption is against there being an additional unlawful objective.

The direction of the important decisions, *i.e.*, the National Labor Relations Board decisions, is with us on this

important point. After all, the action of the Board on a complaint is conclusive on the question as to whether the charge should have been entertained, *Hicks v. N. L. R. B. and Friedman-Marks,* 100 F. 2d 804.

There is no use in issuing Taft-Hartley injunctions on the "tainted purpose" theory if the National Labor Relations Board is going to disavow them by dismissing the complaints, as has been happening in the Twenty-first Region.

See:

Emison, dba Santa Ana Lumber Co., 21-CC-60, 87 N. L. R. B., No. 135, C. C. H., par. 9,482 (the appeal to this court from the Decree of Injunction was dismissed after the N. L. R. B. dismissed the complaint);

Di Georgio Wine Co., 87 N. L. R. B. No. 125, C. C. H., par. 9,477 (as to Teamsters Union).

At the time of the entry of the decree in the trial court June 10, 1949, not even the *Pure Oil* case, June 17, 1949, had been decided, holding that picketing and publication in a primary dispute which had the incidental and obvious effect of inducing a secondary boycott, was not violation of 8(B)(4)(A). (*Pure Oil Co.,* 84 N. L. R. B. No. 38, C. C. H., Par. 9000.)

Since then we are powerfully reinforced by the *Emison-Santa Ana Lumber* case, *supra*, and *Grauman Co. and Denver B. T. C.,* 87 N. L. R. B. No. 136, C. C. H., Par. 9479, decided the same day, December 16, 1949.

There is now, finally, an 8(B)(4)(D) case squarely in point, *Ship Scaling Contractors Association and Local 961 (AFL),* 87 N. L. R. B. No. 14, 20 C. D. 7, November 18, 1949, C. C. H., Par. 9415. This case involved a dispute over work assignments between a C. I. O. and an A. F. of L. union, but there was also an issue, and picketing, over a difference in wage scales. The National Labor Relations Board dismissed the notice of 10-K hearing on this showing.

It is also interesting to note that the *Rabouin* case *(Conway Express)* on which the Regional attorney relied heavily in the trial court in the *Sealright* case, U. S. District Court, Northern District of New York, Civil 3084, 75 Fed. Supp. 414, has been shot out from under him by the Board in an important divided purpose case, *Henry V. Rabouin, dba Conway's Express and International Brotherhood of Teamsters Local 294,* 87 N. L. R. B. No. 130, December 16, 1949, C. C. H., Par. 9475.

VII.

The Injunction Appealed From Is Couched in the Language of the Act, Is so Vague and Indefinite That It Is Impossible to Ascertain Therefrom What Conduct Is Allowed and What Conduct Is Forbidden, and Is Contrary to Rule 65(d).

This point is argued under VI. See the following cases dealing generally with the ascertainable standard requirement:

Lanzetta v. New Jersey, 301 U. S. 451, 59 S. Ct. 618, 81 L. Ed. 888;

In re Blaney, supra;

In re Bell, 19 Cal. 2d 495.

VIII.

The Injunction Appealed From Is Broader Than the Dispute Involved and Decided by the Board, Unnecessarily Restricts the Rights of the Union Members, Compels Them to Work Against Their Desires and Prohibits Their Withholding Their Services.

The plain provisions of 10-K make the determination therein a necessary prerequisite to any complaint that may be filed. We think that no amended charge filed too late to be considered at a 10-K hearing will support a complaint, and that it is impossible for a regional officer to find a complaint should issue on such a charge, the imprimatur of 10-K hearing being lacking and impossible. The Board refused to consider the second amended charge [Tr. 231—see footnote] which is the basis of the petition herein, Paragraphs 7, 8, 9 [Tr. 4, 5], because it was filed after the 10-K hearing.

Our conclusion is that if Section 10-K means what it says then the petition's allegations in the above mentioned paragraphs as to reasonable cause to issue complaint are palpably false and that petitioner has brought before the court evidence of acts, in support of the second amended charge, occurring subsequent to the 10-K hearing. Such are the allegations of subparagraphs (i) and (j) of paragraph of the petition and of the proofs thereunder [Tr. 9, 10, 30, 31, 32].

The court found on the second amended charge [Finding 6, Tr. 114] and we fully set forth our objection [Tr. 105] based on the filing of this charge after the 10-K hearing and Board Rules, 203.74-203.77, inclusive.

The court found in the Decision [Finding 8, Tr. 115] and we fully objected [Tr. 1-7] because it was a conclusion and not a finding of fact and fails to show that the Decision is not on the record amended charge. The court found on commerce [Finding 9, a, b, c, and d, Tr. 115-116] to which we objected [Tr. 107] as being against the evidence. The court found on the overt acts [Finding 9-e, Tr. 117] to which we objected as unsupported by the evidence, being a conclusion of law, and lacking sufficient specification [Tr. 107, 108]. The court found that respondents had failed to comply with the Decision [Finding 9-f, Tr. 118] to which we objected [Tr. 108] on the ground that there was no evidence before the court to support the finding. The court found on violation of 8(B)(4)(D), commerce, and continuing injury [Finding 9-g, h, i, Tr. 118] to which we objected [Tr. 108] that these findings had no support in the evidence.

We objected to conclusions of law in favor of petitioner on Commerce (1), Jurisdiction (4), Overt acts in violation of 8(B)(4)(D) affecting commerce under Section 2, Subd. 627 (5), the Constitutionality of 8(B)(4)(D) (6), and to the finding of injunction against respondents (7); and we objected to the Decree as well as (7) above as being contrary to Rule 65-D, because broader than the dispute involved and because denying to respondents the protection of 8-C of the Act.

The application of Section 10-1 in the manner in which the prohibition against striking and inducing work refusals is written into the injunction, is a violation of the inhibitions of the Thirteenth Amendment to the United States Constitution. See: *Podlock v. Williams,* 322 U. S. 4, 64 S. Ct. 792, 88 L. Ed. 1095.

IX.

The Act Does Not Confer Jurisdiction on the Board to Hear and Determine Matters Such as Are Presented in This Case Arising Out of a Building Enterprise Purely Local in Nature and Not Contributing to the Flow of Interstate Commerce, and Hence the District Court Had No Jurisdiction to Entertain the Petition.

On this point see *Industrial Association v. United States,* 268 U. S. 64. In view of our proposition in III above that the trial court accepted an unjustified assumption instead of proof on commerce, and the uncontroverted allegations of our return that the alleged acts affected only a local labor situation in building construction. [Par. XII, Tr. 49.]

X.

The Sixth Finding of Fact Based on the Second Amended Charge Erroneously Supports the Injunction With Matters Not Considered by the Board or on Which There Has Been a 10-K Hearing.

This point is made on the objection to the Findings treated under Point VIII, pointing out that this finding on Paragraphs 7, 8 and 9 of the Petition goes to matters not considered at the 10-K hearing and brought up after the 10-K hearing.

XI.

The Acts and Conduct of the Respondents Below Justifying the Issuance of the Injunction Are Not Found or Specified in Reasonable Detail.

We believe that no discussion on this point is required, since the findings to which objection was made, speak for themselves.

XII.

The Injunction Is Not Limited to Proper Pendente Lite Relief But Finally Determines the Issues Presented by the Charges Against the Unions and Grants Full and Final Relief Against Them Without Trial.

As pointed out in the statement of the case, the effect of the injunction, which by its terms runs only to the Redondo Beach power plant job, of course exceeds the time required for the job. The effect of the injunction is, very apparently, to settle jurisdiction on the job by conferring the benefits of an illegal closed shop contract on the Machinists and Westinghouse.

XIII.

The Injunction Erroneously Omits to Preserve to the Unions the Rights Guaranteed by Section 8-C of the Act in Failing to Exclude From Its Prohibitions Acts Which Do Not Involve Threats or Reprisal or Promises of Benefit.

This point has been covered under Point VI.

Respectfully submitted,

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